

# **EXHIBIT A**

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

COALITION FOR ICANN TRANSPARENCY  
INC., a Delaware corporation,

Plaintiff,

v.

VERISIGN, INC., a Delaware corporation;  
INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS, a  
California corporation,

Defendants.

No. C-05-04826 RMW

TENTATIVE ORDER GRANTING  
DEFENDANTS' MOTIONS TO DISMISS

[Re Docket Nos. 152, 160]

Defendant VeriSign, Inc. ("VeriSign") and defendant Internet Corporation for Assigned Names and Numbers ("ICANN") (collectively, "defendants") each move to dismiss plaintiff's First Amended Complaint ("FAC") for failure to state a claim. Plaintiff Coalition For ICANN Transparency, Inc. ("CFIT") opposes both motions. The court has read the moving and responding papers and considered counsels' arguments. For the reasons set forth below, the court tentatively grants defendants' motions to dismiss.

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**I. BACKGROUND**

This action involves two types of services related to Internet domain names. The factual allegations relevant to the present motions are set forth in this order. Additional factual background is set forth in the court's February 28, 2006 Order Denying Verisign's Motion to Dismiss and Granting Defendants' Motions for Judgment on the Pleadings ("Feb. 2006 Order").

**A. The Parties**

CFIT is a nonprofit membership organization whose members "include certain Internet domain registrars, registrants, back order service providers, including Pool.com, Inc. and R. Lee Chambers Company, LLC. CFIT was formed for the purpose of challenging the allegedly anticompetitive agreements and activities of defendants as set forth in the FAC. *Id.* ¶ 7.

ICANN is a private not-for-profit corporation that coordinates the Internet domain name system ("DNS") on behalf of the United States Department of Commerce ("DOC"). *Id.* ¶¶ 58-59. ICANN's bylaws provide that it shall "[i]ntroduc[e] and promot[e] competition in the registration of domain names where practicable and beneficial in the public interest." *Id.* ¶ 64. ICANN operates under a Memorandum of Understanding ("MOU") with the DOC. *Id.* ¶¶ 59-63. The MOU "is effectively ICANN's charter." *Id.* The MOU's purpose is to "promote[ ] the management of the DNS in a manner that will permit market mechanisms to support competition and consumer choice in the technical management of the DNS." *Id.* The MOU prohibits ICANN from "unjustifiably or arbitrarily" injuring "particular persons or entities or particular categories of persons or entities." *Id.* It requires ICANN to "act in a non-arbitrary and reasonable manner with respect to . . . any . . . activity related to a DNS project." *Id.* The original MOU was scheduled to expire in September 2000. *Id.* ICANN and the DOC have amended it six times. *Id.* The most recent amendment reiterates the DOC's "policy goal of privatizing the technical management of the DNS in a manner that promotes stability and security, competition, coordination, and representation." *Id.* In this amendment, ICANN also reaffirms its "commitment to maintaining security and stability in the technical management of DNS, and to perform as an organization founded on the principles of competition, bottom up coordination, and representation." *Id.*

1           **B.       The Internet Domain Name System**

2           Every computer connected to the Internet has a unique Internet Protocol ("IP") address. FAC  
3 ¶ 19. IP addresses are long strings of numbers, such as 64.233.161.147. *Id.* The Internet DNS  
4 provides an alphanumeric shorthand for IP addresses. *Id.* ¶ 20. The hierarchy of each domain name  
5 is divided by periods. Thus, reading a domain name from right to left, the portion of the domain  
6 name to the right of the first period is the top-level domain ("TLD"). TLDs include .com, .gov, .net.,  
7 and .biz. *Id.* ¶ 21. Each TLD is divided into second-level domains identified by the designation to  
8 the left of the first period, such as "example" in "example.com" or "example.net." *Id.* SLDs can be  
9 further divided in third-level domains, such as "another" in "another.example.com" and so on. *Id.*  
10 Each domain name is unique and thus can only be registered to one entity. *Id.* ¶ 24. CFIT alleges  
11 that the ".com" and ".net" TLDs have become the "definitive TLDs for all commercial and private  
12 TLD registrants." *Id.* ¶ 13. One reason is purportedly that other TLDs are either restricted as to  
13 accessibility (e.g., country code TLDs such as ".us") or restricted as to use or meaning (e.g., ".edu"  
14 or ".gov"). *Id.* ¶¶ 12-13.

15           A domain name is created when it is registered with the appropriate registry operator. *Id.* ¶  
16 25. A registry operator maintains the definitive database, or registry, that associates the registered  
17 domain names with the proper IP numbers for the respective domain name servers. *Id.* The domain  
18 name servers direct Internet queries to the related web resources. *Id.* A registrant can register a  
19 domain name only through companies that serve as registrars for second level domain names.  
20 Registrars accept registrations for new or expiring domain names, connect to the appropriate registry  
21 operator's TLD servers to determine whether the name is available, and register available domain  
22 names on behalf of registrants. *Id.* ¶ 48. As such, registrars necessarily need access to the registry  
23 maintained by the registry operators. When a domain name is expiring (and not renewed by the  
24 current registrant), the registry operator notifies the registrars. To register an expired domain name,  
25 registrars send "add" commands to the registry database. *Id.* An "add" command is accepted  
26 (thereby registering the name) only if the name is available. *Id.* Therefore, to increase the chances  
27 of obtaining a popular expired domain name, a registrar may send a rapid series of "add" commands  
28 for the expired name. *See* Feb. 28 Order at 3. Due to competition for registration of expiring

1 domain names, a registrant may use the services of "back order service providers." *Id.* ¶ 49. Back  
2 order service providers further increase the chances of a registrant obtaining a highly demanded  
3 expiring domain name by pooling the resources of several registrars. In this way, the registrant's  
4 chances of an "add" command being accepted increases. *See* Feb. 28 Order at 3-4.

5 The majority of domain name registrations for commercial purposes utilize the .com TLD.  
6 *Id.* ¶ 43. CFIT alleges that demand for .com TLDs is not interchangeable with other TLDs and  
7 consumers are willing to pay substantially more for .com domain name registrations. *Id.* ¶ 40. As  
8 an example, CFIT alleges that no significant number of consumers switched from .com to .net as a  
9 result of the more than thirty percent decrease in registration fee for .net registrations in July 2005.  
10 *Id.* ¶ 44. Indeed, CFIT asserts that many .com domain name registrants consider the other TLDs to  
11 be complements to, rather than substitutes for, the .com registration. *Id.* ¶ 41. Thus, a registrant  
12 often seeks concurrent domain name registrations in a number of TLDs (e.g., verisign.com,  
13 verisign.net, verisign.info, verisign.biz). *Id.* On the other hand, .net domain names have been the  
14 primary domain names used by registrants in the networking service, such as internet service  
15 providers and e-mail service providers. *Id.* ¶ 45. CFIT contends that substitution among TLDs is  
16 not feasible because many registrants' .com or .net domain names have become their trademark or  
17 tradename, are associated with consumer goodwill, and represent their online brand name and  
18 identity. *Id.* ¶¶ 42, 45.

### 19 C. VeriSign and ICANN's Relationship

20 In the past ICANN has selected the registry operator for the .com and .net TLDs through a  
21 bidding process. FAC ¶ 34. Once a registry operator is selected, it serves as the sole registry  
22 operator for the applicable TLD registry (.com or .net) until the expiration of the registry agreement.  
23 *Id.* ¶ 35. Currently, VeriSign is the registry operator for the .com and .net domains pursuant to  
24 written registry agreements between ICANN and VeriSign. *Id.* ¶¶ 16, 25.

25 In May 2001 VeriSign and ICANN entered into a .com registry agreement (the "2001 .com  
26 Agreement") and a .net registry agreement (the "2001 .net Agreement") under which VeriSign  
27 would be the sole registry operator of the .com and .net TLD registries. *Id.* ¶¶ 67-68. The 2001  
28 .com Agreement expires November 10, 2007. *Id.* ¶ 69. Under this agreement VeriSign may make a

1 written proposal sometime between November 10, 2005 and May 10, 2006 to request a four-year  
2 renewal term. ¶ 69. ICANN must then consider the proposal and grant the extension unless (1)  
3 ICANN determines that VeriSign is in material breach of the agreement, (2) the proposal contains a  
4 maximum price that exceeds what is allowed under the existing 2001 .com Agreement, or (3)  
5 "certain other conditions apply." *Id.* The 2001 .net Agreement was set to expire June 30,  
6 2005. Competitive bidding was solicited prior to its expiration and VeriSign was again selected as  
7 the .net registry operator. *Id.* ¶ 34. Thus, in 2005, VeriSign and ICANN entered into a .net registry  
8 agreement (the "2005 .net Agreement").

9 VeriSign and ICANN have also negotiated and signed a proposed .com registry agreement  
10 that will replace the current 2001 .com Agreement (the "2006 .com Agreement"). The 2006 .com  
11 Agreement effectively extends VeriSign's operation of the .com registry for an additional five years  
12 beyond the original expiration date without any competitive bidding process. *Id.* ¶ 84. CFIT alleges  
13 that by negotiating and agreeing to the 2006 .com Agreement ICANN and VeriSign are "bypassing"  
14 the process in the 2001 .com Agreement that would trigger ICANN's solicitation of competitive  
15 bids. *Id.* ¶ 71. Specifically, VeriSign has proposed a maximum price for domain name registrations  
16 which exceeds that allowed under the 2001 .com Agreement which CFIT contends would otherwise  
17 have triggered an obligation on ICANN's part to seek competitive bids. *Id.* ¶ 89. According to  
18 ICANN, registry agreements, including renewals, must be approved by ICANN's board of directors  
19 and by the DOC. ICANN's RJN Ex. E (MOU Am. 3)<sup>1</sup>; *see also* ICANN's Mot. at 5. ICANN notes  
20 that the 2006 .com Agreement was approved by the ICANN board of directors on February 28,  
21 2006, but has not yet been approved by the DOC.

22 CFIT alleges that the contractual relationships between VeriSign and ICANN present several  
23 problems. First, pursuant to the 2001 .com Agreement ICANN has the right to seek competitive  
24 bids to replace VeriSign as registry operator upon the original expiration on November 10, 2007 (or  
25 earlier because VeriSign has already allegedly breached the 2001 .com Agreement repeatedly). *Id.* ¶

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27 <sup>1</sup> Pursuant to ICANN's Request for Judicial Notice the court takes judicial notice of the  
28 MOU and amendments available on ICANN's Internet site and to which several of CFIT's  
allegations reference. *In re Silicon Graphics Securities Litigation*, 183 F.3d 970, 986 (9th Cir. 1999)  
(a court may consider documents referred to within a complaint on a motion to dismiss).

1 70. CFIT suggests that ICANN is "required" to seek competitive bids because of the MOU's  
2 mandate that ICANN support competition and ICANN has purportedly not sought such competitive  
3 bids. *Id.* CFIT alleges that both the 2006 .com and 2005 .net Agreements include a renewal  
4 provision that allows ICANN to solicit competitive bids upon expiration of the agreement "only if a  
5 court or arbitrator issued a non-appealable final order finding VeriSign to be in breach of the  
6 agreement, and VeriSign failed to cure the breach." *Id.* ¶ 38. CFIT asserts that this renewal  
7 provision constitutes ICANN's "conspiratorial agreement to waive its right to impose competitive  
8 bidding" for operation of the .com and .net registries. *Id.* ¶ 87. In comparison, the renewal  
9 provisions in the 2001 .com and .net Agreements allowed ICANN to solicit competitive bids upon  
10 expiration if ICANN deemed VeriSign to be in material breach. *Id.* ¶ 69.

11 Second, VeriSign has been freed from pricing constraints formerly in place in the 2001 .com  
12 and .net Agreements. In particular, the maximum price in the 2006 .com Agreement now excludes  
13 the "registry-level transaction fee" (paid to ICANN), sets the (maximum) price at \$6.00 through  
14 December 31, 2006, and permits VeriSign to increase the price seven percent in four of the  
15 following six years, which CFIT asserts is excessive. *Id.* ¶ 89. At the same time, registrars and  
16 Internet stakeholders have no input into prices as the fee increases are allegedly automatic pursuant  
17 to the contractual provision. *Id.* ¶ 90. Similarly, the 2005 .net Agreement sets the maximum price at  
18 \$4.25 until December 31, 2006 and then "[b]eginning in 2007, the price controls set forth in the  
19 2005 .net Agreement will be eliminated." *Id.* ¶ 91. CFIT contends that "VeriSign will be  
20 unconstrained in setting prices and will charge the maximum cap allowed." *Id.* ¶ 88.

21 Third, CFIT alleges that under the 2006 .com Agreement ICANN may permit VeriSign to  
22 provide additional registry services if ICANN determines that no competition concern exists. *Id.* ¶  
23 93. CFIT concludes that VeriSign is therefore permitted to launch services, such as VeriSign's  
24 proposed Central Listing Service ("CLS") and Wait List Service ("WLS") that would "displace the  
25 competitive back order services market . . . or similar services." *Id.* ¶ 94. Further, CFIT asserts that  
26 because "nothing in the contracts or otherwise will prevent VeriSign from further increasing prices,"  
27 consumers will pay more. *Id.* ¶ 111 The 2005 .net Agreement and the 2006 .com Agreement also  
28 abandon certain "Consensus Policies" representing the interests of Internet stakeholders and certain

1 provisions and obligations set forth in the 2001 .com and .net Agreements designed to avoid  
2 unreasonable restraints on trade and to promote fair competition. *Id.* ¶¶ 74-77, 80.

3 **C. CFIT's Causes of Action**

4 CFIT alleges causes of action against (1) VeriSign in the .com and .net Registration Markets  
5 for monopolization under section 2 of the Sherman Act, (2) VeriSign in the .com and .net  
6 Registration Markets for attempted monopolization under section 2 of the Sherman Act, (3)  
7 VeriSign in the Expiring Names Registration Services under section 2 of the Sherman Act, (4)  
8 VeriSign and ICANN in "all relevant markets" for conspiracy to monopolize under section 2 of the  
9 Sherman Act, (5) VeriSign and ICANN in "all relevant markets" for conspiracy in restraint of trade  
10 under section 1 of the Sherman Act and (6) VeriSign and ICANN in "all relevant markets" for  
11 conspiracy in restraint of trade under the Cartwright Act.

12 The court's February 28, 2006 order ("Feb. 28 Order") granted defendants' motions for  
13 judgment on the pleadings because CFIT's complaint did not adequately allege facts supporting that  
14 CFIT had associational standing to file the present action. Feb. 28 Order at 14. The Feb. 28 Order  
15 also clarified certain pleading issues with respect to CFIT's antitrust allegations. In particular, the  
16 court noted that the amended complaint should differentiate the alleged Expiring Names  
17 Registration Services Market from domain names in general and provide detailed allegations tending  
18 to show that registered and unregistered domain names are not reasonably interchangeable. Feb. 28  
19 Order at 17.

20 **II. ANALYSIS**

21 **A. Legal Standard**

22 A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint.  
23 Dismissal can be based on the "lack of a cognizable legal theory" or "the absence of sufficient facts  
24 alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th  
25 Cir. 1988). The issue is not whether the non-moving party will ultimately prevail but whether it is  
26 entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d  
27 246, 249 (9th Cir. 1997). The court's review is limited to the face of the complaint, documents  
28 referenced in the complaint, and matters for which the court may take judicial notice. *Levine v.*



1 *Diamantheset, Inc.*, 950 F.2d 1478, 1483 (9th Cir. 1991). When evaluating a Rule 12(b)(6) motion,  
2 the court must accept all material allegations in the complaint as true and construe them in the light  
3 most favorable to the non-moving party. *Barron v. Reich*, 13 F.3d 1370, 1374 (9th Cir. 1994). A  
4 court must not dismiss a complaint for failure to state a claim unless "it appears beyond doubt that  
5 the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."  
6 *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also United States v. Redwood City*, 640 F.2d 963,  
7 966 (9th Cir. 1981). However, the court is not required to accept conclusory legal allegations "cast  
8 in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts  
9 alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

10 **B. Associational Standing**

11 VeriSign and ICANN argue that CFIT's amended complaint still fails to allege adequate facts  
12 to support that CFIT has associational standing to file the present action. An association may invoke  
13 the doctrine of "associational standing" to bring a complaint "on behalf of its members." *See New*  
14 *York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 9 (1988). It may do if "(a) its members  
15 would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are  
16 germane to [its] purpose; and (c) neither the claim asserted nor the relief requested requires the  
17 participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432  
18 U.S. 333, 343 (1977). When a defendant moves to dismiss on standing grounds, the court must  
19 "accept as true all material allegations of the complaint, and . . . construe [it] in favor of the  
20 complaining party." *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988). At the same time, though,  
21 "[i]t is a long-settled principle that standing cannot be inferred argumentatively from averments in  
22 the pleadings, but rather must affirmatively appear in the record." *FW/PBS, Inc. v. City of Dallas*,  
23 493 U.S. 215, 231 (1990) (plurality opinion) (citations and quotation marks omitted). Therefore,  
24 "[i]t is within the trial court's power to allow or to require the plaintiff to supply, by amendment to  
25 the complaint or by affidavits, further particularized allegations of fact deemed supportive of  
26 plaintiff's standing." *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975).

1 VeriSign argues that CFIT has failed to adequately allege association standing.<sup>2</sup> CFIT's initial  
 2 complaint had only alleged vague categories of members that might suffer harm. Thus, the court found  
 3 that associational standing had not been alleged because CFIT failed to name even one member. As  
 4 amended to support standing CFIT's complaint now alleges that its purpose is "to promote the interests  
 5 of its member businesses by seeking a competitive and fair market for domain name registry services":

6 CFIT was formed for the purpose of challenging the anticompetitive agreements and  
 7 activities of defendants alleged herein, including the 2006 .com Agreement. CFIT's  
 8 members include Internet domain name registrars, registrants, and back order service  
 providers, including but not limited to Pool.com, Inc. and R. Lee Chambers  
 Company, LLC.

9 FAC ¶ 7.<sup>3</sup> CFIT alleges that Pool.com competes in the Expiring Names Registration Services Market  
 10 and introduced the "pay-for-performance" business model whereby customers paid only if the back  
 11 order service provider obtained the domain name for the customer. CFIT contends this model, which  
 12 has been largely adopted, encourages competition based on quality of service and price. FAC ¶¶ 49-50.  
 13 Elsewhere in the complaint CFIT contends that the 2006 .com Agreement includes a provision that  
 14 permits VeriSign to propose new services, including the CLS service, which CFIT alleges would  
 15 displace "the competitive back order services market." *Id.* ¶ 94. Based on these allegations, the court  
 16 finds that the FAC adequately identifies at least one member (Pool.com) who CFIT alleges will suffer  
 17 threat of injury based on the 2005 .net and 2006 .com Agreements. Thus, the court finds these  
 18 allegations sufficient to meet the first and second prongs of the requirements under *Hunt*. *See Hunt*, 432  
 19 U.S. at 342 ("The association must allege that its members, *or any one of them*, are suffering immediate  
 20 or threatened injury as a result of the challenged action of the sort that would make out a justiciable case  
 21 had the members themselves brought suit.") (emphasis added).

### 22 C. Antitrust Standing

23 In addition to identifying at least one member, however, plaintiffs must allege facts sufficient  
 24 to establish that there is "immediate or threatened injury as a result of the challenged action[s]." *Id.*

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 26 <sup>2</sup> ICANN argues that CFIT fails to establish that any member of CFIT could possibly  
 have standing to sue in its own right because CFIT has failed to allege any antitrust violations or  
 antitrust injuries. ICANN Mot. at 23.

27  
 28 <sup>3</sup> Other than naming R. Lee Chambers Company, LLC as a member and supporter,  
 CFIT make no allegations as to the identity of R. Lee Chambers Company, LLC.

1 CFIT's allegations of improper monopoly are two fold. First, ICANN and VeriSign's "agreements and  
2 understandings" have the effect of making VeriSign the permanent operator of the .com and .net  
3 registries. CFIT alleges that this shields VeriSign from competitive pressures of a re-bidding process  
4 and discordant with ICANN's obligation to maintain competition. FAC ¶ 3. Second, ICANN and  
5 VeriSign's "agreements and understandings" improperly permit VeriSign to extend its monopoly control  
6 to the downstream markets for back order and other services. *Id.* Therefore, here, plaintiffs must also  
7 establish antitrust standing:

8 [T]he focus of the doctrine of "antitrust standing" is somewhat different from that  
9 of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient  
10 to satisfy the constitutional standing requirement of injury in fact, but the court must  
make a further determination whether the plaintiff is a proper party to bring a private  
antitrust action.

11 *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535  
12 (1983). "A plaintiff may only pursue an antitrust action if it can show 'antitrust injury, which is to  
13 say injury of the type the antitrust laws were intended to prevent and that flows from that which  
14 makes defendants' acts unlawful.'" *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055  
15 (9th Cir. 1999) (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)).  
16 The Ninth Circuit has articulated four requirements for establishing antitrust injury: "(1) unlawful  
17 conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct  
18 unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Am. Ad Mgmt.,*  
19 *Inc.*, 190 F.3d at 1055.

20 One way to demonstrate market power for a § 2 claim of unlawful monopoly is through  
21 direct evidence of the "injurious exercise of market power." *Rebel Oil Co., Inc. v. Atlantic Richfield*  
22 *Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). Under this method, the plaintiff offers evidence of  
23 "restricted output and supracompetitive prices that is direct proof of the injury to competition which  
24 a competitor with market power may inflict" in the relevant market. *Id.* Accordingly, an act is  
25 deemed anticompetitive under the Sherman Act only when it harms both allocative efficiency and  
26 raises the prices of goods above competitive levels or diminishes their quality. *Id.* at 1433.  
27 Alternatively, unlawful market power may be demonstrated circumstantially by: (1) defining the  
28 relevant market, (2) showing that the defendant owns a dominant share of that market, and (3)

1 showing that there are significant barriers to entry and that existing competitors lack the capacity to  
2 increase their output in the short run. *Id.* at 1434.

3 1. The Expiring Names Registration Services Market

4 As the court noted in its Feb. 28 Order, a plaintiff must allege a relevant product and  
5 geographic market to state a claim under sections 1 and 2 of the Sherman Act. A market consists of  
6 all "commodities reasonably interchangeable by consumers for the same purposes[.]" *United States*  
7 *v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). "If consumers view the products as  
8 substitutes, the products are part of the same market." *Rebel Oil Co.*, 51 F.3d at 1435. "In  
9 economists' terms, two products or services are reasonably interchangeable where there is sufficient  
10 cross-elasticity of demand. Cross-elasticity of demand exists if consumers would respond to a slight  
11 increase in the price of one product by switching to another product." *Todd v. Exxon Corp.*, 275  
12 F.3d 191, 201-02 (2d Cir. 2001). "Congress prescribed a pragmatic, factual approach to the  
13 definition of the relevant market and not a formal, legalistic one." *Brown Shoe Co. v. United States*,  
14 370 U.S. 294, 336 (1962).

15 CFIT alleges that the market for back order services used by end users in the purchase and  
16 sale of expiring domain name registrations (the "Expiring Names Registration Services Market") is a  
17 separate relevant market. *Id.* In the court's Feb. 28 Order, the court noted that *Weber v. Nat'l*  
18 *Football League*, 112 F. Supp. 2d 667 (N.D. Ohio 2000) and *Smith v. Network Solutions, Inc.*, 135  
19 F. Supp. 2d 1159 (N.D. Ala. 2001) have rejected the market definition of Expiring Names  
20 Registration Services as a matter of law. Feb. 28 Order at 16-17. The *Weber* court reasoned that the  
21 infinite number of potential domain names made the proper market "domain names in general." 112  
22 F. Supp. 2d at 673-74. Similarly, the *Smith* court held that domain names were reasonably  
23 interchangeable whether expired or not:

24 [T]here is no inherent difference in character, for purposes of interchangeability  
25 and cross-elasticity of demand, between domain names that are 'expired' and held  
26 by NSI and those that are not. It is true in a literal sense that each domain name is  
27 unique. And one given individual domain name may be far more valuable on the  
28 open market than others. But products need not be entirely fungible to be  
considered part of the same relevant market . . . . [T]he *Weber* court did more  
than decide that the two names did not constitute the relevant market; the court  
reasoned that the relevant market was all domain names generally as a result of  
cross-elasticity of demand. Because the number of domain names, unlike

1 traditional commodities, is essentially unlimited, there will always be reasonable  
2 substitute names available for any given name kept out of circulation, whether by  
3 a registrar or by the registrant, regardless of whether we are talking about two  
4 names or a hundred and sixty thousand.

5 135 F. Supp. 2d at 1169-70. Nevertheless, in the Feb. 28 Order the court declined to hold that  
6 CFIT's market definition necessarily fails as a matter of law. Feb. 28 Order at 16-17. Instead, the  
7 court found that it was at least theoretically possible that CFIT could allege facts tending to show  
8 that registered and unregistered domain names are not reasonably interchangeable, and granted leave  
9 to amend. *Id.* On the one hand "products need not be entirely fungible to be considered part of the  
10 same relevant market." *Smith*, 135 F. Supp. 2d at 1169. On the other hand, price disparities are  
11 relevant for grouping commodities into relevant markets. *See E.I. du Pont de Nemours & Co.*, 351  
12 U.S. at 404. To the extent CFIT's new allegations differentiate the alleged Expiring Names  
13 Registration Services Market from domain names in general, CFIT may properly allege a relevant  
14 market.

15 VeriSign argues that CFIT has failed to allege a lack of interchangeability between expired  
16 domain names and domain names of different statuses (i.e., never before registered or registered).  
17 The court agrees. While CFIT alleges that there exists a "competitive marketplace" for obtaining  
18 expired domain names comprising of back order service providers competing on the basis of price  
19 and service, these allegations do not give rise to an inference of a lack of interchangeability. In  
20 particular, CFIT alleges that back order service providers, of which Pool.com is one, provide  
21 services assisting customers in the procurement of recently-expired domain names. FAC ¶¶ 48-50.  
22 CFIT alleges that at one time SnapNames, a back order service provider, charged \$60 to a customer  
23 seeking an expired domain name, whether or not it succeeded in obtaining the name. *Id.* ¶ 49. CFIT  
24 also alleges that Pool.com introduced a pay-for-performance model where customer pay only if the  
25 domain name is procured. *Id.* ¶ 50.

26 These allegations, however, do not indicate that domain names are not reasonably  
27 interchangeable by virtue of their "expired" status or otherwise raise an inference that the alleged  
28 Expiring Domain Names Registration Services market is a separate relevant market. At most, these  
allegations suggest that some expired domain names may be in greater demand than others such that

1 a registrant might be willing to pay an additional fee in order to increase its chances of procuring  
2 that domain name. Registration of a domain name, whether new or expired, are completed through  
3 the same process with a registrar. As CFIT alleges, "to register a new or expiring domain name, a  
4 registrar sends an 'add' command to VeriSign's registry computer for that domain name." FAC ¶ 48.  
5 It appears that a registrant register expired names with or without the use of a back order service  
6 provider. There is no indication that an expired domain name always commands a higher price or  
7 there are any price differentials charged by the registrars for an expired domain name versus a new  
8 domain name. Even if "price disparities are relevant for grouping commodities into relevant  
9 markets," *see* Feb. 28 Order at 17 (citing *E.I. du Pont de Nemours & Co.*, 351 U.S. at 404), no such  
10 disparity is alleged here. Rather, similar to the *Smith* court's analysis, here, CFIT has not alleged  
11 any "inherent difference in character, for purposes of interchangeability and cross-elasticity of  
12 demand, between domain names that are 'expired' and held . . . and those that are not."<sup>4</sup> Essentially,  
13 the only distinction alleged is that there is an additional service available for the registration of  
14 expiring domain names, which customers may choose to use for some expired domain names.  
15 Therefore, CFIT has not alleged, for purposes of assessing alleged antitrust injury, that there exists a  
16 relevant market for Expiring Domain Names Registration Services separate from the market for the  
17 registration of domain names in general.

## 18 2. The Domain Name Registration Market

19 CFIT also identifies the market for the purchase and sale of domain name registrations (the  
20 "Domain Name Registration Market") as a relevant market. FAC ¶ 11. It is unclear whether CFIT  
21 is alleging that the market is that of the .com and .net domain name registrations only or whether it is  
22 that of domain name registrations in general. CFIT defines the Domain Name Registration Market  
23 as purchase and sale of domain name registrations in general, yet CFIT's allegations suggest the lack  
24 of demand cross-elasticity between the registration of .com and .net domain names on the one hand

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26 <sup>4</sup> CFIT does allege that the other TLDs are not substitutes for the .com and .net TLDs  
27 and that there is low demand cross-elasticities between the .com domain name and domain names  
28 for TLDs such as .net, .biz, and .info. FAC ¶¶ 39-45. However, this does not give rise to an  
inference of low demand elasticity as between domain names of different registration statuses as  
would be required to indicate that the Expiring Domain Names Registration Services constitute a  
separate relevant market.

1 and the registration of domain names for all other TLDs on the other hand.<sup>5</sup> See FAC ¶¶ 39-47.  
 2 Regardless, CFIT's allegations adequately show that at least the .com and .net domain name  
 3 registrations constitute a relevant market. It is not disputed that because there can only be one  
 4 registry operator per registry, VeriSign, as the sole registry operator of the .com and .net registries,  
 5 necessarily holds a monopoly in domain name registration for those registries during the term of the  
 6 applicable registry agreement. FAC ¶ 35.<sup>6</sup>

7 VeriSign and ICANN argue that CFIT cannot establish antitrust standing because the alleged  
 8 injuries are not the type of injuries that antitrust laws are intended to prevent. Sherman Act § 2 ("§  
 9 2") states: "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire  
 10 with any person or persons, to monopolize trade shall be guilty" of an antitrust violation. 15 U.S.C. §  
 11 2. To establish a § 2 violation for attempted monopolization, the plaintiff must show "specific intent  
 12 to control prices or destroy competition, predatory or anticompetitive conduct directed at  
 13 accomplishing that purpose, dangerous probability of achieving monopoly power, and causal  
 14 antitrust injury." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 (9th Cir.1988). Similarly, to  
 15 establish a conspiracy to restrain trade, there must be a showing of specific intent or awareness as to  
 16 one or more of the alleged co-conspirators. *Syufy Enters. v. Am. Multicinema, Inc.*, 793 F.2d 990,  
 17 1001 (9th Cir. 1986). CFIT must plead facts establishing injury to competition in the market for the  
 18 registration of domain names in general. 15 U.S.C. § 1. Here, CFIT's allegations of antitrust  
 19 violations, attempted antitrust violations, and conspiracy in restraint of trade stem from VeriSign and  
 20 ICANN's agreement to certain revisions to the 2005 .net and 2006 .com Agreements.

21 First, CFIT alleges that the renewal provisions in the Agreements permit VeriSign to serve as  
 22 the sole registry operator of the .net and .com registries "in perpetuity." Opp. at 8. The renewal  
 23 provision under both Agreements "virtually guarantee that VeriSign will not have to periodically bid

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 25 <sup>5</sup> If CFIT contends the market consists of the domain name registrations regardless of  
 TLD, then CFIT has failed to allege that VeriSign has any monopoly in that market.

26 <sup>6</sup> This "monopoly" relates to the operation of registries but CFIT's argues that  
 27 VeriSign's sole access to the .com and .net traffic data combined with the proposed CLS service  
 28 would necessarily result in CFIT being the sole "auctioneer" of expired domain names. Regardless,  
 as discussed earlier, CFIT does not adequately allege there exists a relevant market of Expiring  
 Names Registration Services.

1 for control over the registries." *Id.* CFIT's complains that the replacement of the 2001 .com  
2 Agreement with the 2006 .com Agreement constitutes ICANN's waiver of its right to impose  
3 competitive bidding with respect to operation of the .com registry. FAC ¶ 87. These allegations  
4 merely show, however, that the proposed 2006 .com Agreement extends the term of VeriSign's  
5 designation as the registry operator for the .com registry under the 2001 .com Agreement. The  
6 parties do not dispute that VeriSign was lawfully selected to be the registry operator for the .com  
7 registry. Mere extension of VeriSign's lawful appointment as the registry operator does not  
8 constitute an antitrust violation.

9 Under the 2001 .com Agreement, VeriSign may propose a four year extension which ICANN  
10 must consider "before deciding whether to call for competing proposals from potential successor  
11 registry operators." FAC ¶ 69. ICANN must then consider the proposal and grant the extension  
12 unless (1) ICANN determines that VeriSign is in material breach of the agreement, (2) the proposal  
13 contains a maximum price that exceeds what is allowed under the existing 2001 .com Agreement, or  
14 (3) "certain other conditions apply." *Id.* Under the proposed 2006 .com Agreement, ICANN may  
15 solicit competitive bids upon expiration of the agreement "only if a court or arbitrator issued a non-  
16 appealable final order finding VeriSign to be in breach of the agreement, and VeriSign failed to cure  
17 the breach." *Id.* ¶ 86. Thus, under either the 2001 and the 2006 versions, as alleged by CFIT,  
18 ICANN may solicit competing bids upon expiration of the agreement. The only difference is that  
19 under the 2001 provision ICANN makes the decision whether VeriSign is in material breach, thus  
20 warranting solicitation of competing bids while under the 2006 provision ICANN defers the decision  
21 of whether VeriSign is in material breach (and thus whether competitive bids should be solicited) to  
22 a court or arbitrator.<sup>7</sup> The court fails to see how this modified provision results in VeriSign as the  
23 registry operator of the .com and .net registries "in perpetuity." While the methodology differs, both

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27 <sup>7</sup> Notably, under the 2001 .com Agreement VeriSign has the right to challenge a non-  
28 renewal under section 15 of the agreement, which provides for resolution of disputes in court or  
through arbitration. FAC, Ex. 1 ¶¶ 15, 25.



1 provisions contemplate that competitive bids will be solicited in the event VeriSign is deemed to be  
2 in material breach of the registry agreement.<sup>8</sup>

3 Second, CFIT contends that 2005 .net and 2006 .com Agreements increase the prices that  
4 VeriSign may charge for registrations by increasing the maximum permissible price and permitting  
5 significant price increases in future years.<sup>9</sup> Specifically, the 2005 .net Agreement removes price  
6 controls after 2007 and the 2006 .com Agreement permits future price increases of up to seven  
7 percent in four of the next six years. VeriSign argues that increases in prices, without more, are not  
8 subject to antitrust scrutiny. ICANN argues that the setting of maximum prices is not precluded by  
9 antitrust laws and have been found to be pro-competitive in some instances. In opposition, CFIT  
10 contends only that defendants cannot dispute that the price increases are permissive rather than  
11 mandated, as that is a factual issue. Opp. at 14-15. It does not appear disputed that the revisions to  
12 the 2005 .net and 2006 .com may result in increases in future prices. However, CFIT provides no  
13 argument to support why its allegations of the increases in price caps or removal of price controls  
14 support, as a matter of law, an antitrust violation. Specifically, CFIT has not alleged facts  
15 supporting that the future prices contemplated in the agreements will serve as significant barriers to  
16 entry or are otherwise supra-competitive.<sup>10</sup>

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18 <sup>8</sup> CFIT's suggestion that ICANN's deferral of the decision of whether a breach by  
19 VeriSign is material to the courts or to an arbitrator constitutes a waiver of ICANN's right to solicit  
20 competitive bids is unpersuasive. See FAC ¶ 87. The only difference is that the material breach  
21 determination will be made by a court or arbitrator. CFIT's suggestion necessarily assumes that  
22 ICANN would not pursue its contractual right to have VeriSign's conduct adjudicated as a material  
23 breach, but CFIT's allegations do not support such an assumption. Moreover, CFIT's contention that  
24 ICANN is in breach of the requirements of ICANN's MOU with the DOC is conclusory as CFIT has  
25 alleged no facts to support that the DOC finds ICANN's proposed 2006 .com Agreement to be a  
26 violation of any MOU obligations. In any event, the proposed 2006 .com Agreement is subject to  
27 express review and approval by the DOC.

28 <sup>9</sup> CFIT's allegations appear inconsistent in that CFIT alleges that pricing in the 2005  
29 .net Agreement is wrongful and reflect "supra-competitive" pricing, yet elsewhere CFIT alleges that  
30 the 2005 .net Agreement was a product of competitive bidding. See Opp. at 14; FAC ¶ 34. See also  
31 Opp. at 8 ("For example, because the 2001 .net Agreement did not have the renewal provisions that  
32 VeriSign now seeks for the 2006 .com Agreement, VeriSign faced competitive bidding upon  
33 renewal of the 2001 .net Agreement, and had to lower its fees.") (citing FAC ¶¶ 69-70).

<sup>10</sup> CFIT's assertion that the prices are supra-competitive is conclusory and does not  
represent a factual allegation giving rise to an inference of antitrust injury. Moreover, since these  
increases in price levels are "permissible" under the agreement, there can be no factual allegations at

1 Third, CFIT asserts that VeriSign (and ICANN in collusion) has leveraged and threatens to  
2 leverage its monopolies in the registry operator market (for .com and .net domain names,  
3 presumably) to adjacent and downstream markets. CFIT alleges that the unlawful conduct stems  
4 from VeriSign's intention to implement CLS which will eliminate the current competitive  
5 marketplace for back order services. FAC ¶¶ 108-112. In particular, CFIT contends that VeriSign's  
6 launch of such services would eliminate competition because of VeriSign's exclusive access, as  
7 registry operator, to traffic data of Internet users' attempts to visit unregistered domain names. *Id.* ¶  
8 94. Currently, when a domain name expires, VeriSign releases the name and customers may register  
9 the expired domain name through a registrar, with or without the assistance of a back order service  
10 provider. *See* FAC ¶ 110. With CLS, VeriSign will offer expired domain names for auction.  
11 Registrants may bid for the expired domain names through registrars. CFIT alleges "[r]egistrants  
12 will continue to order domain names through registrars, but registrars must deal directly with  
13 VeriSign in order to receive expiring names to offer to prospective clients." *Id.*

14 VeriSign and ICANN both argue that CLS would be pro-competitive because it creates the  
15 potential for new competition. Further, VeriSign may only propose such new services to  
16 ICANN—ICANN must still approve the services. To the extent CFIT's allegations assumes that  
17 CLS will be anticompetitive, it improperly presupposes that ICANN will abdicate its regulatory to  
18 review the competitive effects of proposed services. ICANN's Mot. at 15. In opposition, CFIT  
19 argues whether CLS will be a competitive service is "irrelevant" and "the Complaint's allegations  
20 that CLS threatens to harm competition by eliminating a highly competitive back order services  
21 pooling industry . . . and other adjacent markets, must be accepted as true." Opp. at 15.

22 Defendants' arguments are well taken. Even if the court assumes, as it must, that CLS will  
23 eliminate the demand for back order services, the court need not assume as true that such elimination  
24 suffices as predatory conduct actionable under antitrust laws. "It is well established that the antitrust

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26 this juncture that the prices have created barriers to entry. In its opposition CFIT argues that the  
27 issue of whether the price increases or removal of price controls constitute required price increases  
28 or permissive price increases is a question of fact not before the court on these motions, CFIT has  
nevertheless not articulated sufficient facts to infer that these provisions are anything other than  
provisions that permit VeriSign the ability to raise prices. *See* FAC ¶¶ 88-91. CFIT's assertion that  
VeriSign *will* impose these higher prices are conclusory and unsupported by factual allegations. *Id.*

1 laws are only intended to preserve competition for the benefit of consumers." *Am. Ad Mgmt., Inc.*,  
2 190 F.3d at 1055 (citing *Associated Gen.*, 459 U.S. 519, 538 (1983)). "A plaintiff has the burden to  
3 plead and prove that the defendant's actions harmed competition, not that the actions harmed  
4 plaintiff in its capacity as a competitor." *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*,  
5 783 F.2d 1347, 1350 (9th Cir. 1986). At issue here is the market for the registration of .com and .net  
6 domain names by registrants. As ICANN notes, what is to be protected are the "competitive  
7 conditions that foster the development of cost-effective and high quality products" to registrants.  
8 Here, CFIT has alleged that the back order services market is highly competitive and participants  
9 compete on the basis of price and service. As alleged, currently expired domain names are made  
10 available and registrars randomly send "add" commands in attempts to secure the domain name for a  
11 registrant. A registrant seeking to increase the number of "add" commands made on its behalf could  
12 procure the services of a back order service provider to pool together resources of several registrars.  
13 As alleged, VeriSign's CLS product proposes to notify participating registrars of expiring domain  
14 names and hold a five-day auction for such names during which registrars may bid for the names on  
15 behalf of registrants. FAC ¶ 96. The registration goes to the successful bidder and the proceeds is  
16 divided ten percent to VeriSign (as registry operator) and ninety percent to the registrar. *Id.*

17 Other than arguing that back order service providers will be displaced by CLS, CFIT does  
18 not allege how consumers, namely the registrants, would be harmed by CLS. CFIT makes no  
19 allegations that CLS would result in higher prices or lower quality of service to registrants. Indeed,  
20 the inference is that an auction, open to all registrars and registrants, would result in the registration  
21 of expired names at a price determined by market forces. Moreover, the allegations give rise to an  
22 inference that there might be increased competition among registrars under an auction system as  
23 compared to the present lottery-like system. CFIT's assertion that there will be "predictable adverse  
24 price effects for consumers" is conclusory. In any event, under the 2006 .com Agreement, ICANN  
25 shall refer any proposed services that it believes raises significant competition issues to the  
26 appropriate government authority. FAC ¶ 93. In sum, CFIT has failed to allege that VeriSign's  
27 rights under the 2006 .com Agreement to propose new registry services for ICANN's approval  
28 violates antitrust laws or constitutes specific intent to violate antitrust laws.

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**III. ORDER**

For the foregoing reasons, the court tentatively grants defendants' motions to dismiss.

DATED: \_\_\_\_\_

\_\_\_\_\_  
RONALD M. WHYTE  
United States District Judge

1 **Notice of this document has been electronically sent to:**

2 **Counsel for Plaintiff(s):**

3	Jesse Markham	JMarkham@mofo.com
	Cathleen Stadecker	cstadecker@mofo.com
4	Jennifer Lee Taylor	JLeeTaylor@mofo.com
	Keith Butler	kbutler@mofo.com
5	Stuart C. Plunkett	splunkett@mofo.com
	William Stern	wstern@mofo.com

6 **Counsel for Defendant(s):**

7	Laurence J. Hutt	laurence_hutt@aporter.com
8	James S. Blackburn	james_blackburn@aporter.com
	Courtney Schaberg	cmschaberg@jonesday.com
9	Eric Patrick Enson	epenson@jonesday.com
	Jason C. Murray	jcmurray@jonesday.com
10	Jeffrey A. LeVee	jlevee@jonesday.com
	Sean William Jaquez	swjaquez@jonesday.com

12 Counsel are responsible for distributing copies of this document to co-counsel that have not registered for e-filing under the court's CM/ECF program.

15 **Dated:** \_\_\_\_\_

\_\_\_\_\_ **Chambers of Judge Whyte**